COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON EMPLOYMENT, EDUCATION AND WORKPLACE RELATIONS

Reference: Employee share ownership in Australian enterprises

THURSDAY, 10 JUNE 1999

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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON EMPLOYMENT, EDUCATION AND WORKPLACE RELATIONS

Thursday, 10 June 1999

Members: Dr Nelson *(Chair)*, Mr Barresi, Mr Bartlett, Dr Emerson, Ms Gambaro, Mrs Gash, Ms Gillard, Mr Katter, Mr Sawford and Mr Wilkie

Members in attendance: Mr Barresi, Mr Bartlett, Dr Emerson, Ms Gambaro, Mrs Gash, Mr Katter, Dr Nelson, Mr Sawford and Mr Wilkie

Terms of reference for the inquiry:

The extent to which employee share ownership schemes have been established in Australian enterprises and the resultant effects on:

(a) workplace relations and productivity in enterprises; and

(b) the economy.

WITNESSES

Committee met at 9.01 a.m.

COLLEY, Mr Graeme, Senior Adviser, Superannuation, Australian Taxation Office

D'ASCENZO, Mr Michael, Second Commissioner, Australian Taxation Office

O'NEILL, Mr Michael, Assistant Commissioner, Strategic Intelligence Analysis, Australian Taxation Office

CHAIR—I declare open this second public hearing of the inquiry into employee share ownership plans and welcome the witnesses and others who are in attendance this morning. We will be taking evidence today from the Australian Taxation Office. The purpose of this inquiry is to identify the extent to which employee share ownership plans have been established in Australian enterprises and to assess the impacts of those plans on workplace relations and productivity in enterprises and on the economy.

I now call representatives of the Australian Taxation Office to give evidence and I welcome you here today. I remind you that the proceedings here today are legal proceedings of the parliament and warrant the same respect as proceedings in the House itself. The deliberate misleading of the committee may be regarded as a contempt of the parliament. The committee prefers that all evidence be given in public but should you at any stage wish to give evidence in private you may ask to do so and the committee will consider your request. If you would like to give us a 10 minute summary of your submission to this inquiry, then we will ask questions and engage in some discussion about it.

Mr O'Neill—Perhaps I will kick off. Our submission really touches on broader issues than direct economic impacts of employee share schemes. We were concerned to raise with the committee some of the issues the commissioner has been investigating over the last 12 months or so around some abuses of employee share schemes where schemes designed for tax wipeouts are designed either as share schemes, benefit trusts or superannuation schemes. We call these sorts of schemes employment benefit arrangements and they fall into those distinct categories: superannuation, benefit trusts, or share schemes. An update since our submission is that on 19 May the commissioner announced his view on these arrangements. At that time the commissioner stated that he had concerns about the tax efficacy of these arrangements, that some of these arrangements were being mass marketed and that potentially hundreds of millions of dollars were at stake if the commissioner did not take action.

There was some ambiguity in the market place about what the ATO view was and, as there were potentially many taxing points associated with these arrangements, we thought it was an equitable response to institute a safe harbour provision. We set up a hotline, set up a specialised team and invited people to come in up until 30 June so that there would be one taxing point and appropriate penalties. I suppose that is the critical update. We can go into some particular details in respect of those arrangements and their particular form if you like or we can await your questions.

CHAIR—Thanks very much. Is there anything that you would like to add, Mr D'Ascenzo?

Mr D'Ascenzo—Sorry I was late, I was stopped by the guards at the front.

CHAIR—It is very unusual for all of the members to be here on time and have the witnesses be late.

Mr D'Ascenzo—My apologies.

CHAIR—Mr O'Neill has just done a very good job of summarising the concerns that in particular the ATO has in relation to employee share ownership schemes. Is there anything you would like to say, Mr D'Ascenzo, generally about the submission?

Mr D'Ascenzo—I think basically, as Michael mentioned to you, there are two aspects to the provisions. The first is the conflicting nature of provisions that are there to favour an activity that allows employees to benefit from the arrangements, and the second thing is where those arrangements are used in a way that is contrary to that underlying policy. I think Mr O'Neill would have covered that in his opening remarks. That is basically where we come from.

CHAIR—In a release that the ATO put out in May you referred to a review of employee benefit arrangements and said that they were, and I quote:

contrived arrangements that intend to frustrate the clear policy intent of the law.

Can you elaborate on why you have that view.

Mr D'Ascenzo—In fact that does not go to the provisions themselves but goes to how people are using the provisions. What we see, for example our recent ruling on fringe benefits tax, are arrangements where really very little real money goes in; people start to have back to back arrangements with financing vehicles sometimes introduced by the promoter of schemes, a mass marketing of these arrangements—what we call a round robin of funds where you give me some money, I give it back to you and that amount is paid back off, and it just goes around without any real effect, no real risk involved in the process. They are very contrived, no real money ends up for the benefit of employees, it goes back to the employer. They are the sort of arrangements that we think are not effective under the law. In the case of the example that I gave you, we think that the schemes that are marketed with a view to avoiding any taxing point in that sort of arrangement are subject to fringe benefits tax and we also think that the general anti-avoidance provision will apply. Once you start seeing the contrivance that we see here, you really are seeing very much the same sort of contrivances we were seeing in the late seventies and early eighties of paper schemes.

CHAIR—On page 18 of your submission I notice you said that at the publicly listed end of the market you thought that overall employee share ownership schemes are a fairly positive thing. You say:

The problems mostly occur in the small to medium segment where privately held companies predominate. It would appear, on the evidence available, that employee share ownership schemes are not looked upon as an option, as they would dilute the "controller's" interest in the company or the employee would have a limited resale market for the shares.

Do you have a view firstly if it is desirable to encourage employee share ownership schemes in the small to medium segment and, secondly, if it is, how that could be encouraged so as to keep the ATO comfortable?

Mr D'Ascenzo—We do not have any problems about the concept of employee share schemes in small business because that would fit with the broad philosophy underlying the provisions generally. As we alluded to there, one of the problems was the dilution of control sometimes in these situations and I am not sure how that can be overcome. Mr O'Neill might have some ideas on that.

Mr O'Neill—I think it picks up some themes in the reform of business tax where consolidation of corporate groups arises. For GST purposes, the proposal is consolidation of 100 per cent commonly owned groups. In respect of business tax a different consolidation test is proposed, a 90 per cent test. Sorry, no, I am getting those two wrong: that should be vice versa. But those tests are intended to have an 'out' in respect of employee share schemes so that consolidation can still occur in the context of an employee share plan. Maybe there is some scope for movement around what does it mean for a wholly owned group.

Mr D'Ascenzo—As I mentioned beforehand, the concern is not so much about the employee share scheme or the provisions, it is where they start to introduce artificial features of round robins and no real risk associated with the contribution. It really is a contrivance: they are there to ensure that the employer retains all the benefit of the funds that might be available—

Mr KATTER—Chairman, can I just ask for a specific example.

Mr D'Ascenzo—Let us say I am a—

Mr KATTER—Can you give me examples?

Mr D'Ascenzo—I cannot give you a case for—

Mr KATTER—No names, without putting names on it.

Mr D'Ascenzo—We have a whole range of diagrams which probably might be the best way of seeing this.

Mr KATTER—I was more interested in an actual specific example.

Mr D'Ascenzo—Maybe you, Mr O'Neill, can give him an example that might bring these features together without naming the taxpayer but putting some life into it.

Mr KATTER—Yes, that is what I am after. It is all generalities to me.

Mr O'Neill—I have only one copy of that diagram but I will give that to you in a minute, Mr Katter.

Mr KATTER—That is not what I am after. Michael knows exactly what I am after.

Mr O'Neill—We have an employer setting up a special purpose company. The employer then—

Mr D'Ascenzo—Just before that, often an employer is either approached or has the benefit of someone who is marketing these arrangements on a broad basis, so often these are in what we call the category of mass-marketed schemes with a tax element too.

Mr O'Neill—So the employer sets up a special purpose subsidiary. In most of these cases there is not a wide range of employees who are eligible to take advantage of these share schemes, contrasting the legislative share where 75 per cent of involvement of employees is the test. The key employee, often the director, is the person invited to subscribe for a share in this company. They acquire a share worth one dollar, one dollar par value. A premium is then paid in respect of that share of $999. That special purpose company then has $1,000. That $1,000 is then loaned back to the employing company, the originator of the scheme, so there is no funds flow in terms of cash going around. There might be cheques that are endorsed, there might be promissory notes that are endorsed—although in fact there might be just book entries to represent the flow of funds—but essentially it is moving money to another entity. In some ways it has characteristics similar to a dividend strip: taking profits out of the originating company and investing them in a special purpose subsidiary.

Mr KATTER—Thank you.

Mr SAWFORD—Just in terms of the whole spread, on the one hand with employee share ownership you have the legitimate activity of capital formation in terms of being more productive—and I assume the Tax Office is very generous in terms of its measurement of that—to absolute tax minimisation and really blatant tax minimisation. You gave us some examples of round robins, but there must be examples of employee share ownership where they are totally 100 per cent legitimate: it is capital formation and they are investing, and this is a country that needs investment. What sort of criteria do you apply to that? Rather than what you have said already, can you be a little bit more expansive on how you identify tax minimisation? I would like to follow that up with another question then if I may.

Mr O'Neill—I think legitimate arrangements are often associated with large companies where there is a high level of public scrutiny by shareholders, employees, the Australian Securities Commission, the stock exchanges, et cetera. Those sorts of arrangements are not the sort of arrangements we are talking about. The arrangements we are talking about are often detected because of their mass marketing nature; they are often detected because there are these round robins of funds. It is—

Mr SAWFORD—Before you go on to that, I understand what you are saying about the large companies but there must be small and medium companies that also need capital formation. Surely they are not illegitimate either, and not because they are not public, they are private companies: surely they are not all illegitimate?

Mr O'Neill—Oh no, certainly not.

Mr SAWFORD—How do you make the difference; how do you distinguish it?

Mr O'Neill—One criterion would be the involvement of employees generally. A lot of the arrangements we talk about in our press release do not have a general base of employees who have an entitlement to these share schemes. We see schemes where the people who are entitled to acquire the shares are the people who already control the company, the directors, et cetera—the controlling mind and will if you like. One of the indicators would be the broad base, I think.

Mr D'Ascenzo—Another indicator, Mr Sawford, is whether or not there is any capital formation. As Mr O'Neill pointed out, usually there is no real funds injection, there is no real capital formation at all: funds were from the originating company and they really stay in the control of the originating company, there is no addition to that stock. In other arrangements where the funding comes through a third party financier, it is usually a financier associated with the promoter and the round robin arrangement means that the money goes back into the repayment of the original loan and there is no actual increase in the capital of the business.

Mr SAWFORD—I do not want to know what the framework is but I assume the tax office has a framework to identify the mass marketing of these schemes. Do you?

Mr D'Ascenzo—In fact, one of the reasons why we have been slower than we should have been in identifying these arrangements is because we have been conscious that there is a legitimate concession embodied in the provisions and therefore we have been trying very hard to make those provisions work in the way they were intended. Unfortunately, what we now have seen is that people have aggressively tried to engineer or contrive a situation where they get the benefits without really providing the underlying policy benefit for small business or large business from these arrangements. Our strategic intelligence unit has been looking at these arrangements now for some two years. That has involved trying to understand the very numerous variety of arrangements that is there to distinguish the wheat from the chaff, so to speak. Having done that, we then have to work out what our response is to those in law and then try to provide that in some public way to ensure that people who have done the right thing are not disadvantaged but people who are trying to exploit it inappropriately are stopped from getting the benefit of the arrangement generally. Perhaps Mr O'Neill might go further there. Mr O'Neill has taken over leadership of that task recently and one of his main priorities has been to try to bring together the various threads of work that we had done in the past.

Mr O'Neill—The process in general terms is the sorting out of a wide range of advisers and finding out the nature of different types of employee benefit arrangements.

Mr SAWFORD—But do you have a framework in which you can identify capital formation or legitimate minimisation? Do you have frameworks from which you operate or are you just developing these frameworks?

Mr O'Neill—Well, the framework is really going out and seeing if there is actual capital creation, having a look at the financial records, having a look at the employees who are

entitled to benefit under the arrangement. Those sorts of indicators of round robins et cetera are giving us the criterion we need to separate the wheat from the chaff.

Mr D'Ascenzo—But I might add there that the unfortunate saga is that we are finding very little wheat—in fact, all of the ones that we are coming across now have these features of a single director benefiting out of the arrangements with no real capital injection, other than what comes out of a company and what comes out of a finance arrangement that is tied to a repayment.

Mr SAWFORD—Just one last question. What is your view of executive share options, particularly when they are paid in lieu—

CHAIR—Just before you go on, Phil had a question on that.

Mr BARRESI—Just going back to Rod's previous question, what triggers the investigation? Is there a trigger? Is it the first return that that company makes or is there some other way that you can identify that this company has embarked, or is about to embark, on such a scheme?

Mr O'Neill—There are probably several triggers, there is no one individual trigger. Some of the court cases that have been heard over the last 12 months in which the commission is a party have been around us seeking from law and accounting firms client lists. There was a report about one of those cases in the Sydney press a couple of days ago. In order to identify the scope of the problem and separate the wheat from the chaff we have gone to advisers and said, 'Are you selling these sorts of schemes? If so, tell us what the scheme looks like and tell us about the clients who are involved.' That way we can make direct inquiries to those people who have bought into these sorts of schemes. That would be one trigger. Other ways would be from tax returns and external data, other sorts of intelligence.

Mr D'Ascenzo—So basically our approach currently has been to try to identify the promoters of these arrangements and to try to work through that to find out where and to whom the schemes are being sold and peddled.

Mr SAWFORD—I just wanted to ask the contrasting question in terms of employee share ownership on a broad basis to that of executive share options that are given in lieu of salary, in lieu of restructuring, in lieu of downsizing, in lieu of—you name it, they can find a reason for it. What is the tax office's view of executive options?

Mr O'Neill—In policy terms I think our position would be that we could see remuneration benefits in executive options, as well as in the employee share schemes, the alignment of interest, et cetera. There is the potential in both of those that sharp operators at the edge will convert what is a good policy intention into some sort of tax mischief. In respect of executive options, we do not have such direct evidence of that tax mischief at this time.

CHAIR—Do you have a working relationship with, for example, the Employee Share Ownership Association who, I think for good reasons, promotes the concept of these? Do you have a dialogue with any of these groups or work with them in any way?

Mr O'Neill—This week we did meet with some people from that association—they were members of that association but in a different capacity. I am not aware of our having a direct dialogue with them on an ongoing basis. The people who have been involved in packaging and advising on employee share schemes are a wide range of promoters and we would have had lots of interviews with those sorts of people, particularly over the last few months.

CHAIR—Can you tell us how the tax rulings work and why would companies, or perhaps employees, want to come along prospectively and seek a ruling and then the commissioner put a freeze on rulings being issued? Perhaps you can also tell us about the status of that.

Mr D'Ascenzo—Just a general comment, Chair. Since 1992 we have had a binding public ruling system and a binding and reviewable private ruling system, so you have to remember there are two systems. The first is a public one where we outline major issues and our view on major issues that apply generally across a segment. The ruling we did in relation to fringe benefits tax and some of these arrangements is a public ruling. Now, under the law, if someone comes within that public ruling we are bound by the ruling. Taxpayers are not bound by it, albeit they know what our position will be if we identify the arrangement and it is contrary to our ruling—we will take a different perspective. That is a public ruling. I think what you are referring to is our private ruling system.

Our private ruling system again is binding on the commissioner and not on the taxpayer. When we developed the ruling system it was almost like giving taxpayers an opportunity of being assessed: under the old assessing system you would lodge a return and put the facts to us and we would say whether or not it was allowable as a deduction or assessable income or otherwise.

When we moved to a self-assessment system people said, 'Look, in the areas of genuine uncertainty we want this capacity to get some understanding of what our position will be, and we also want more than that: we want to have an understanding of what our position will be in relation to arrangements that we want to enter into. We want the comfort of knowing up-front what our position will be.' That is the private ruling system. The way it works is that someone who has a transaction, or a transaction that is seriously contemplated, applies to the tax office and says, 'This is what I've done' or 'This is what I propose to do,' in some degree of detail—'Is that okay under the tax law?'. The tax office says, 'In our view we think it's okay,' or 'We don't think it's okay,' or whatever might be the outcome. If we said that it achieved the tax results that they wanted, they have the comfort of entering the transaction, and, provided the way it is implemented corresponds to the transaction that they gave to us, they themselves—the people who applied for it—are protected.

So you virtually have a private ruling system that applies to individuals—'I want to know whether my affairs achieve this tax result or not,' and you have a public system that talks about 'Generally does this apply to these arrangements in a more generalist way?'. So

you have the individual who can ask for things themselves, or if there is something of wider significance they then have to ask for a public ruling in that area.

Now, in this situation we have had a range of ruling requests over the years dealing with employee benefit arrangements of various sorts, and requests were made at various branch offices of the ATO. People had a look at those arrangements and provided responses to some of those arrangements. What we have found has been that in relation to some of those private rulings some people did not want to have a public ruling—they just wanted advice from us, something that is really not binding on us. But as a matter of course, so that there is credibility in terms of what the commissioner says, we abide by what we have said in advance opinions unless there are very good reasons to do otherwise. In fact, we have some public rulings, IT2500 and TR92/20, which indicate that, unless there are some really cogent reasons why we should not, for the benefit of the community we will stick by these advance opinions.

Some of these opinions were given, and then, when we looked at how they were being implemented, the tenor of the things that were being put to us and the way that they were being put into application, they really did not reflect what was happening. When they actually were put into place there were changes that made a material difference, so if anything they could actually be used to mislead people rather than otherwise.

CHAIR—So you were endorsing a particular scheme, if you like, or a restructure, and then what was being offered had been modified in some way but still had your endorsement attached to it.

Mr D'Ascenzo—That is right.

CHAIR—What has been the effect of the freezing of the rulings? Have you noticed any slowing in the number of people wanting to get employee share ownership schemes up?

Mr D'Ascenzo—Interestingly enough, the rulings have mainly been by the promoters of these arrangements; they have actually got a ruling and then used it as part of a marketing technique. So it is not really using the ruling the way the system was intended; it is being used as a marketing technique. Sometimes, and I am not sure about these arrangements particularly, but in relation to other aggressive tax planning techniques sometimes what is shown to likely investors or participants in an arrangement is not the full ruling that we give to them, only selected extracts. But in any event, at the end of the day what we have found in these cases is that implementation is not the sort of implementation we had sanctioned through that ruling process.

The other side of it is that, to the extent to which we had a more distributed process to providing advice across 26 branch offices, we have now tightened our range of control and the quality of the rulings that we give. We have worked very hard over the last five years at least to improve the consistency and quality of our rulings and our advice generally. We have set up computer mechanisms that indicate that when someone gives a ruling on certain matters they should access our computer system to see whether or not there has been anything else said on this arrangement so that you cannot do what they used to call 'branch

office shopping'—in other words, you go to one that seems to be a more favourable one and you just keep on going around until you get the 'right' answer.

We have tightened our control as well. We called it an 'embargo' but it was not so much that as more a situation of trying to bring all these various rulings that they had been given together under the control of Mr O'Neill and his team so that we could make sure that what was being said did represent a consistent ATO view and was not something provided by someone who perhaps had not realised the significance of these arrangements.

So when we talk about an embargo, it was not saying we were not giving rulings out; it was more, 'Look, we know these things have happened. The state of play has changed, we're very concerned about how the state of play has changed and we want to make sure that what advice goes out is consistent with our approach from now on.' That does not mean we will not give rulings; it just means that we needed a breather so that we could bring things together, work out what our response should be and then work consistently across all of that.

CHAIR—So at some point you will start giving rulings again?

Mr D'Ascenzo—We will give rulings now. Embargo was probably not the right word; it was just a matter of trying to bring it together so that our dissemination of rulings was more in a coordinated way.

CHAIR—In the submission you also said that under the 13A provisions not all companies take advantage of what is available. Why would a company not want to get a tax deduction for going into these schemes?

Mr O'Neill—I am not really sure what the thinking of the companies are. I suppose one of the issues that contrasts 13A with the sort of schemes that Mr D'Ascenzo was talking about is the huge numbers involved in these tax effective schemes. The contributions there would be in the order of $1 million for an employee, rather than $1,000 under division 13. Issues of unlimited deductibility, rather than just $1,000 deduction for the employer, would make them more attractive. As we mentioned before, I guess that is another reason why we need to stop these tax avoidance schemes, not just because of the revenue issues but because if they were allowed to flourish they would have allowed more attractive concessions than those allowed in the legislation, a complete distortion really.

Mr D'Ascenzo—And that is really the key point that we are finding in these arrangements. They are there to provide concessions which are, as Mr O'Neill mentioned, from 1,000 to 1,000,000 times different from the extent to which parliament thought it was the right level of concession for these sorts of arrangements, with no real productive benefit.

Mr WILKIE—When you were saying earlier that you were finding very little wheat amongst the chaff, what sort of ratio do you think there would be? Can you qualify that?

Mr D'Ascenzo—I might qualify that, Mr Wilkie, by the fact that we are trying to target the chaff more than the wheat. So in a sense what we find is probably what we were looking for.

CHAIR—I think overall the concept is very good.

Mr D'Ascenzo—Having targeted our focus on what we think are the promotional arrangements that work outside that framework and what we think is within the underlying policy provisions, unfortunately I think it is fairly a 100 per cent find.

Mr O'Neill—We would be still processing transactions and arrangements, private rulings, in respect of legitimate share arrangements, and we would have a couple of those, but we would have perhaps 5,000 of the other type.

Mr SAWFORD—That you have identified from reading business magazines?

Mr D'Ascenzo—No, mainly from having identified one. We can work out who marketed that arrangement and then we go through the promoter. That is why you have all these challenges to our request—'We want to find out who marketed them,' and they say, 'We're not telling you.' We say, 'Look, under the law we have asked formally for you to give us this information and the powers of access are there.' They say, 'We don't think you should have it. We're going to claim legal professional privilege.' We are in three court cases at the moment.

CHAIR—I was going to ask you how many successful prosecutions you have had in relation to employee share ownership schemes.

Mr D'Ascenzo—The court cases are more about access to information. Basically our first approach is to access the information and try to manage the fall-out. The tax office is concerned about whether or not we have acted as quickly as we could have acted in some of these arrangements and therefore people may have got into them in the mistaken belief that they are okay. There is the question of these rulings that perhaps seemed to say they were okay, but perhaps applied to different sorts of arrangements or applied to a different implementation of these arrangements, so they might have done it with some degree of belief that what they were doing was not against the law in any way. So our main focus at the moment is to try to tidy that up. People are still challenging our view of what we think are abusive arrangements. The first step is to work out whether we are right legally in that sense. I suppose for prosecution, it would be a question of whether or not there is any fraudulent activity on behalf of any of the players. That is really a second-level inquiry for us at this stage.

Mr SAWFORD—Have you had any successful court cases where you could access who the marketer was?

Mr D'Ascenzo—We have had successful cases in the context of accountants, but we have lost in the case of lawyers. We are challenging these arrangements and we are hopeful that the lawyers on the bench will come to a different conclusion. It is basically a question of legal professional privilege. We argue the point that legal professional privilege—

CHAIR—There is a division in the House of Representatives. I am sorry, we will return.

Proceedings suspended from 9.38 a.m. to 9.56 a.m.

CHAIR—One of the submissions that we have had suggested that it should be possible to make an income tax election for each scheme an employee participates in. What would you think of that?

Mr O'Neill—I am not sure what that was; what was the issue again?

CHAIR—One of the submissions that we had suggested that it ought to be possible to make an income tax election for each scheme an employee participates in. I presume what they mean by that is that they actually get some sort of endorsement or approval or whatever from you before they go into it.

Mr O'Neill—I am not sure if that is related to the private ruling issue that Mr D'Ascenzo was talking about. Under division 13A a participant has two options: they can defer the amount of income for 10 years, the discount if you like, or they can make an election to bring it up-front. My understanding is that that election is open to them in respect of any scheme that they are in. If the issue is a private ruling, then a person who is entering into an employee share plan is entitled to get a private ruling in respect of that plan.

CHAIR—There was an appendix in the submission we received from Qantas that the tax office is not prepared to rule on whether it considers employee share ownership plans to be a form of dividend streaming without the provision of an analysis by Qantas of the tax position of all the Qantas shareholders.

Mr O'Neill—Yes. In that case the real issue was perhaps a legal one rather than us giving them advice. A private ruling is specific to a person in respect of an arrangement, but they were seeking private rulings and they had potentially 30,000 people covered in that arrangement. Where there is any particular arrangement, there is a potential for mischief, and the particular mischief that was possible in some schemes is what we call streaming, the allocation of franking credits to particular persons. We were not able to say in respect of those 30,000 persons individually that none of them had a requisite tax avoidance purpose around streaming. Instead, in that context it was around giving them advice generically which really suited them at the time. Frankly, we were a bit surprised to read that submission.

Mr D'Ascenzo—In fact, what we provided was a framework in relation to which they could then judge for themselves in relation to their particular circumstances, because I think it was unfair to ask us to assume things without knowing what the profile of their shareholding was.

CHAIR—Do you have any suggestions as to how the major legislation governing employee share ownership schemes could be improved? Are there changes that you would like to see or are you happy with the legislation and just want to get on with your job of enforcing it?

Mr O'Neill—It might be early days for us to answer that question. There are probably issues which have come to light out of this raft of tax schemes. We think the present legislation is fine. There is nothing that we have seen at the moment where we say, 'Oh, the present legislation is ineffective to tackle the mischief that we have been talking about.' As

we continue our investigation there will be further audits, and probably, looking at hundreds of cases, there might be issues that we need to talk to government about then.

CHAIR—The $500 fee that you have to pay for a cessation event and valuing the company shares—do you think that is reasonable? Could there be some changes made in that area? It is a bit expensive.

Mr O'Neill—Compliance costs are always an issue for us and the taxpayer. I think valuation is one of the critical issues in employee share plans, and going way back to the 1970s, when employee share plans had a taxing point under section 26(e), one of the mischiefs there was the valuation. Under its successor, section 26AAC, valuation issues again arise. As I see it, the difficulty is having a scheme which is understandable to 30,000 Qantas employees, for example, and having it reasonably efficient from a company's point of view and the tax office point of view. The $500 fee is to get some credibility in the valuation. It goes to the ASX and they give out numbers which we can all live with.

Mr BARRESI—Would you have a list somewhere in your files of those companies who have entered into employee share ownership schemes? I am not interested in the actual names of the companies, more in the type of industry that they represent and the size of industry. Can you give us a breakdown through your records?

Mr O'Neill—According to industry type?

Mr BARRESI—According to industry type and the number of companies out there, and perhaps the number of employees that would be covered by those schemes.

Mr O'Neill—That might be possible. There are two limbs to the question perhaps: those types of arrangements which are consistent with the policy, about which we have no tax concerns, and those types of arrangements which are not. We would have lots of information in respect of these. A breakdown in respect of these ones—perhaps we could look into that. I think it would be fairly difficult for us to do that.

Mr SAWFORD—Could you take it on notice and get back to us?

Mr D'Ascenzo—We will take it on notice and we will provide the committee with the best we can, but the short answer, Mr Barresi, is that we do not have that database. I am happy to see whether or not a search of our files of information can disclose some indication to you in terms of the industries and the order to which—

Mr BARRESI—I just want to get a feel for the size of—

Mr D'Ascenzo—I understand. I recall in our submission to you that we did make the point that we did not really have an up-to-date database in terms of these arrangements. To do those sorts of things you have to sometimes include in return forms a whole range of questions. Over the years we have been trying to keep return forms less complicated for taxpayers, but with hindsight one might say that perhaps this one was one where we should have asked for a tick. Without that there is no way to work through our information. We will try to obtain what we can of a quantitative nature, but I am not sure that there would be

much of that. If there is not much of that, if there is anything even of a qualitative nature that we can add to the committee, we will try to make clear in our response what we have tried to do and what we have found.

Mr O'Neill—Can I just clarify that this is a breakdown by employment industry and employee numbers. Is that what you are looking for?

Mr D'Ascenzo—It applies to which people are taking advantage of the schemes, in what way and where.

CHAIR—Probably the last question I would like to ask is whether you get many complaints about the five per cent rule. There have been arguments put that we should be lifting it above five per cent; would you have any concerns, for example, if that happened?

Mr O'Neill—I suppose the only potential issue I could see is the issue around consolidation moving into a new tax regime and what that means. I guess my experience was that I have not heard complaints in respect of the five per cent rule before reading the submissions to your committee, but I noticed that there was a fairly consistent theme there. Our concern would be that as long as the policy intent is there, the alignment of interests, we would not see a difficulty in principle with that.

CHAIR—How do you deal with an employee who has five per cent and then immediate members of the family have other shares as well in the same company which lifts their voting stock to above five per cent? How do you deal with that under 13A?

Mr O'Neill—There is an association test in division 13A so that if together with my family I control more than five per cent then I fall outside the provision. It is a test common in fringe benefits tax, et cetera.

CHAIR—I would like to thank you for taking the time to provide us with such a good and thorough submission and also for making yourselves available to come along and speak to us. If you are not doing it already, I would appreciate if it you could keep an eye on the submissions that we get and what people are saying, and if you have any further views to contribute or have an opinion about something that is said to us through the course of the inquiry, or you think that we are saying things in ignorance—which is probably likely—please let us know.

Mr D'Ascenzo—We will do that. In fact, we are willing to provide whatever assistance we can to the committee at any time during your deliberations.

CHAIR—I appreciate that very much, thank you.

Resolved (on motion by **Mr Sawford**):

That the committee receives as evidence and include in its records as an exhibit for the inquiry into employee share ownership plans the document received from the Australian Taxation Office entitled, 'Australian Taxation Office Media Release Nat 99/16' dated 19 May 1999.

Resolved (on motion by **Mr Barresi**):

That the committee authorises publication of the evidence given before it at the public hearing today, including publication on the electronic parliamentary database of the proof transcripts.

Committee adjourned at 10.08 a.m.